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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANORE TAFT TILTON, *et al.*,

Appellants,

v.

ELLIOT L. RICHARDSON,
Secretary of the United States Department of Health, Education and Welfare, *et al.*,

Appellees.

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATUTE INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 6, 14, 15, 16, 21

Board of Education v. Allen, 392 U.S. 236 (1968) 6, 13, 14

Clayton v. Kervick, S.C. N.J. (July 20, 1970) 18. 19. 20

Coffey v. State Education Finance Commission 37 L.W. 2451 (1969) 24

DiCenso v. Robinson, 39 L.W. 2023 (1970) 10, 11

Everson v. Board of Education, 330 U.S. 1 (1947) 8, 12, 13

Horace Mann League v. Board of Public Works, 242 Md. 645 (1966) 2, 17

McCollum v. Board of Education, 333 U.S. 203 (1948) ... 7, 16, 24

McGowan v. State of Maryland, 366 U.S. 420 (1961) 6, 13, 14

Reitman v. Mulkey, 387 U.S. 369 (1967) 24

Tilton v. Finch, U.S. Dist. Ct. of Conn., March 19, 1970 ..... 12, 13, 22

Vermont Educational Financing Agency v. Mann 127 Vt. 262 (1968) 20

Walz v. Tax Commissioner, 397 U.S. 306 (1970) 7, 8, 10

Statute: Page

Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701 - 58 (1964) 2, 3, 4, 20, 22

U. S. Constitutional Provisions:

Amendment 1, U. S. Constitution 3

Amendment 5, U.S. Constitution 24

Other Authorities:

Clark, Religion and the Law, 15 S.C.L.Rev. 855, 859 (1963) 14

Cogdell, Gaston D., "What Price Parochiaid?" (1970) 22, 23

Freund, Paul A., Public Aid to Parochial Schools, 74 Case and Comment 4 (1969) 25

Madison, James, Memorial and Remonstrance, 330 U.S. 1 at 63 7

Miscellaneous:

American Commonwealth, James Bryce (1888) 23

New Trend: State Money for Private Schools, U.S. News and World Report (May 4, 1970) 6

"They Had It", Church & State, September 1968 10

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INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington, D. C. area, with some 100,000 members in all the states of the United States. Its sole chartered purpose is to preserve the prin-

ciple of separation of church and state as set forth in the First Amendment to the Constitution of the United States and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members in the State of Connecticut and is especially concerned over any development in the state which raise questions of possible infringements of the Constitution of the State of Connecticut but, more particularly, any possible violations of the religious clauses of the First Amendment to the Constitution of the United States.

This *amicus* brief takes the position that Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-58 (1964) is unconstitutional. This position is not motivated by any hostility to any particular church or to any particular religion. As the Maryland Court of Appeals said in *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

STATUTE INVOLVED

The statutory provision involved in this suit is Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. § 701-58 (1964).

THE QUESTIONS PRESENTED

The final question presented by this appeal is as follows:

(1) Is Title I of the Higher Education Facilities Act of 1963, in so far as it authorizes the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions, unconstitutional as violative of the provisions of the First Amendment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

But before this question can be answered certain fundamental questions of constitutional law must be answered:

(2) Assuming that the legislative purpose of the Act was not aimed at establishing, sponsoring, or supporting religion, does the Higher Educational Facilities Act of 1963, is so far as it authorizes and administers grants to church-related colleges for construction of academic facilities, create an excessive government entanglement with religion and establish an excessive involvement calling for official and continuing surveillance leading to an impermissible degree of entanglement between church and state?

(3) Do the religious clauses of the First Amendment to the United States Constitution make unconstitutional that part of a statute which uses churches or church schools as instrumentalities or agents of the State to carry out an allegedly secular government purpose—namely, the education of students in secular subjects?

If the last two questions are answered in the affirmative, the first conclusory question must also be so answered.

STATEMENT OF THE CASE

This action was brought by a group of fifteen individuals, citizens and taxpayers of the United States and residents

of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut.

Defendant government officials are the Secretary of the Department of Health, Education and Welfare of the United States, the Commissioner of Education for the United States, and the Chairman of the Connecticut Commission on Aid to Higher Education; they are sued in their official capacities, particularly with respect to their duties in the administration of the Act. Defendant colleges and universities are Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, four church related Connecticut colleges and universities.

These institutional defendants are controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, Connecticut, and are organized for and are engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion.

The defendants relied upon the Higher Education Facilisites Act (1963) (Title I, 20 U.S.C. § 701-21 (1964) to grant and receive federal funds for the construction of buildings at undergraduate church colleges, inter alia. Plaintiffs argue that the Act is not to be construed to permit this type of grant to church-related colleges, or if it does, then to that extent the statute is unconstitutional. Amicus contends that the Act entangles the United States, the State of Connecticut and the defendant church colleges in relationships pregnant with involvement, requiring sustained and detailed administrative surveillance by the government.

A state Commission set up under the Act and Regulations in 1964 adopted a plan for participation in the Title I grant program; the plan was submitted to and approved by the State Commission responsible. The Connecticut Commission receives applications for Title I grants from institutions of higher education throughout the State of

Connecticut including the four church-related institutions here defendants. The Connecticut Commission employed a staff which reviewed their applications to determine whether the various statutory criteria of eligibility, the requirements of the Commission and the requirements of the State plan adopted by the Connecticut Commission were met.

The Connecticut Commission then evaluated the applications of the church colleges taking into account projected future enrollment increases at the church colleges (both numerical and percentage); the church colleges' projected increase in facilities (both numerical and percentage) and church colleges' utilization of facilities (which is determined according to a capacity/enrollment ratio, average weekly use of classrooms and average weekly use of laboratories). The United States Office of Education then reviews the recommended grants. The Office of Education sought to assure itself that the church-colleges were in compliance with all applicable provisions of the Act and regulations, including the requirement that no eligible portion of a federally funded facility was to be used for religious worship or sectarian instruction or in connection with any program of a college department of divinity.

The Sacred Heart University received a Title I grant in the amount of $367,100; Annhurst College $444,182; Fairfield University $500,000 and Albertus Magnus College $21,000. Each of these grants in question was approved by the United States Office of Education following recommendation by the Connecticut Commission on Aid to Higher Education. Such approvals and recommendations were based upon applications affirmatively demonstrating that the grant in each instance would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of so-called "secular" academic facilities. Amicus points out that these considerations are outside the jurisdiction and concern of the United States and connote sponsorship, financial support, and active involvement by the sovereign in religious activity.

SUMMARY OF ARGUMENT

The District Court was incorrect in concluding that the issue of the constitutionality of Title I of the Higher Education Facilities Act of 1963 had been resolved by application of the "secular purpose and primary effect" test found in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) and in *Board of Education v. Allen*, 392 U.S. 236 (1968). The basic issue in this case does not rest on "the purpose and primary effect" of the legislation. The "purpose/effect" test is but one facet of the church-state problem, important, but not here decisive. There are other considerations, particularly, the recently emphasized "involvement" test articulated by Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 306 (1970).

Even if the purpose and primary effect of the legislation under consideration is secular and assuming, arguendo,[1] that the legislation was not designed in part as a surreptitious device to aid churches in their educational activities, nevertheless, the legislation is unconstitutional in that it involves the federal government in the affairs of churches and their colleges. As administered, it not only creates "an impermissible degree of entanglement" between the church and state (cf. *Walz*, supra) but blatantly uses church organizations as "agents" to help carry out a broad educational program of the United States. Amicus contends that there is no constitutional power in the United States to use churches to carry out any of its delegated responsibilities, educational or otherwise, where nonreligious means are reasonably available, *McGowan v. State of Maryland*, 366 U.S. 420 (1961). Not only is there no power, but the Establishment Clause of the First Amendment of the Constitution has been interpreted to forbid such "agency" relationship with its inherent "involvement" or "entanglement" of church and state. (cf. *Walz*, supra).

[1]This is a contrary to fact assumption. (cf. *New Trend: State Money for Private Schools* - U.S. News and World Report, May 4, 1970.

ARGUMENT

Amicus will focus its Brief on the unconstitutionality of the Government's involvement in religious affairs, particularly by the choice of a church as its agent or instrumentality to accomplish even a popular secular purpose. This involvement of church with state was criticized by James Madison in his *Memorial and Remonstrance Against Religious Assessments* in 1785. It was repeated in Chief Justice Burger's opinion in *Walz v. Tax Commission* in 1970. (397 U.S. 644). The "Remonstrance" was written to oppose an Assessment Bill for religious instruction pending in the Virginia General Assembly. Mr. Justice Frankfurter described the document as "an event basic in the history of religious liberty." (*McCollum v. Board of Education*, 333 U.S. 203, 214 (1948)). Mr. Justice Rutledge observed that "the Remonstrance is at once the most concise and the most accurate statement of the view of the First Amendment's author concerning what is 'an establishment of religion'." (*Everson v. Board of Education*, 330 U.S. 1, 37.) In his *Memorial and Remonstrance*, Madison pointed out clearly: "We remonstrate against the said Bill, . . . because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or *that he may employ Religion as an engine of Civil Policy*. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; *The second an unhallowed perversion of the means of salvation.*" (Emphasis supplied).

Chief Justice Burger in *Walz*, supra, advanced the same theme one hundred and eighty-five years after Madison's effort. He points out:

> "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, *financial support*, and *active involvement* of the sovereign in religious activity." (slip opinion p.2) (emphasis supplied)

The Act here under consideration, certainly provides financial support and creates active involvement of the sovereign in an important form of religious activity. The religious activity involved is the operation of a church college. Mr. Justice Jackson in *Everson v. Board of Education*, supra, clearly explained: "Catholic education is the rock on which the whole structure rests . . ." (p.24). Chief Justice Burger (*Walz*, supra) noted that churches "maintain schools that plainly tend to assure future adherence to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools." (*Walz*, slip opinion p.6). The "Act" clearly, then, authorized a form of government subsidy to those churches which operate private colleges which is a form of religious activity.

A subsidy by the state of any church activity is constitutionally suspect as an aid to religion (*Everson*, supra) or as an entanglement of state with church (*Walz*, supra). As Mr. Justice Brennan stated in his concurring opinion in *Walz*:

> ". . . *A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole.* An exemption, on the other hand, involves no such transfer." (*Walz*, slip opinion p.10) (emphasis supplied)

Chief Justice Burger clearly and properly interprets the Establishment Clause of the First Amendment as prohibiting legislation which creates a substantial involvement of the government with religion as opposed to a passive tax exemption. He pointed out:

> "granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet no lesser, involvement than taxing them. In analyzing either alternative, the questions are whether the involvement is excessive, and whether it is a continuing one call-

> ing for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously, a direct money subsidy would be a relationship pregnanat with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . ." (*Walz*, slip opinion pp. 9,10)

The Act, here in question, obviously requires a sustained and detailed administrative relationship for enforcement of statutory and administrative standards. An example of this abrasive entanglement of state with church is reported in *CHURCH & STATE*, September 1968:

> "They Had It
>
> The Ohio Valley College of Parkersburg, W. Va. has had it. When the trustees discovered that a $76,000 grant from the Federal Government, knocked out the school's auditorium as a place for chapel services, they were irate. When the facts of Federal aid were explained to them they protested this infringement of "freedom of worship."
>
> In vain Dr. J. M. Powell, president of the college, pleaded that the school's services really were not very religious. "Its just a devotional period . . . ." he protested, but it was out, nevertheless. Bible classes were also banned from the new building.
>
> Ohio Valley College launched a drive to raise the $76,000 and pay it back before the fall term opened. The trustees had learned the facts of life the hard way." (p. 14)

It is also clear from *Walz* that involvement is a matter of degree. Chief Justice Burger puts it succinctly: "The test is inescapably one of degree." (*Walz*, slip opinion p.9) Mr. Justice Harlan in his concurring opinion elaborates on the idea:

> "Whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a

> later case upon a record that fully develops all the pertinent considerations such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement - on a neutral basis - than the Federal Government. Cf. e.g. my separate opinion in *Roth v. United States*, 354 U.S. 476, 496 (1957)." (*Walz*, slip opinion p.6).

Mr. Justice Brennan in *Walz* also touched on the prohibited employment of the organs of government for essentially religious purposes. He found:

> "To the extent that the exemptions further secular ends, they do not advance 'essentially religious purposes.'" To the extent that purely religious activities are benefitted by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, *as it would were it to subsidize them*. . .
>
> Finally, I do *not* think that the exemptions *'use essentially religious means to serve governmental ends, where secular means would suffice.'"* (*Walz*, slip opinion pp. 13 and 14) (emphasis added)

The most recent federal case involving the Establishment Clause of the First Amendment is *DiCenso v. Robinson* decided by a three-judge federal district court for the District of Rhode Island, June 15, 1970. (39 L.W. 2023). The three-judge federal court in *DiCenso* had the benefit of the *Walz* opinion. In *DiCenso* the court observes:

> ". . . the [Supreme] Court [in Walz] focuses on whether the statute fosters 'excessive entanglement' between government and religious institutions. Such entanglement is variously characterized as 'sponsorship', 'interference', and a relationship generating 'confrontation and conflicts'. Most pertinently in discussing the alternatives of taxing or

exempting church property, the Chief Justice: '[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . 38 U.S.L.W. at 4350' (appendix p.17)

"*Walz* thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, *nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.*" (DiCenso, slip opinion pp. 17 and 18) (emphasis supplied).

The *DiCenso* case also clearly reiterates that it is the nature of the institution rather than the activity which makes the difference between the right of the government to aid or hinder under the Establishment Clause. "This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause."

It has been almost axiomatic and not seriously controverted that the First Amendment forbids government involvement with religion. The classic test is found in *Everson v. Board of Education*, supra, (1947) where the court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his

> will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (emphasis supplied). (pp. 15-16)

This *Everson* test or principle obviously covers a great many different situations where the government acts: (1) so as to set up a church; (2) to aid one particular religion; (3) aid all religions or religions in general; (4) prefer one religion over another; (5) require a person to go to church; (6) require a person to stay away from church; (7) force a person to profess a belief or disbelief in any religion; (8) punish a person for entertaining or professing religious beliefs or disbeliefs; (9) punish a person for church attendance or non-attendance; (10) use tax funds to support religious activities; (11) use tax funds to support religious institutions which practice or teach religion; (12) become involved or participate in the affairs of religious groups; (13) or permit religious groups to participate in state affairs.

In the present case, the stated purpose of the Act, as far as here pertinent, is stated: "to authorize assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation or improvement of needed academic and related facilities in undergraduate and graduate institutions." The court below added another class to those stated: "Indeed the legislative history is quite conclusive that Congress intended to make the benefits of the Act available to church related colleges and uni-

versities. Not only did the sponsors and floor managers of the legislation so state in the debate, but amendments to deny the benefits of the Act to such institutions were voted down." (opinion below) Their conclusion requires that this court determine whether the Act, as so construed, if it cares to adopt the construction, actually has as its purpose or has a primary effect that neither advances nor inhibits religion.

The purpose/effect test was originally formulated by Chief Justice Warren in *McGowan v. State of Maryland* (supra) as follows:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can be demonstrated that its purpose - evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect - is to use it for its coercive power to aid religion."

Its latest statement in *Allen,* supra, is as follows:

> "Based on Everson, Zorach, McGowan, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:
>
> 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education,* 374 U.S. at 222."

That Justice Clark who articulated the *Schempp* test did not expect it to be used in lieu of the *Everson* tests is clear from his article in the South Carolina Law Review:

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and *where there is some working arrangement between the two . . .*" (15 S.C.L. Rev. 855, 859 (1963) (emphasis added).

It is crucial to understand that the *Schempp* test *is not needed in all situations involving a state relationship with a church institution.* It is only useful when there is a question about what the purpose of a statute is or what, in practice, the statute actually accomplishes.

The *Schempp* formulation was most useful in *McGowan v. State of Maryland*, 366 U.S. 420 (1961) which required the court to determine the constitutionality of certain "Sunday Closing" Laws. This required a study of what the legislators had in mind when they adopted the legislation. The court correctly stated the test and applied it:

> "Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state."

Likewise in *Board of Education v. Allen*, 392 U.S. 236 (1968) a problem arose as to whether Section 701 of the Educational Law of the State of New York actually had among its purposes to aid religion, to use church schools as agencies of government, or to put the Government in partnership with church schools to carry out its secular educa-

tional responsibilities. The court applied the "purpose/effect" test and found as a matter of fact that it was neither the purpose nor primary effect of the statute to aid any church school. Mr. Justice White stated:

> "This test is not easy to apply, but the citation of Everson by the Schempp Court to support its general standard made clear how the Schempp rule would be applied to the facts of Everson. The statute upheld in Everson would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."

The *Schempp* test has no useful role to play in a situation where, as here, there is no question as to the purpose or primary effect of the particular legislation or where the statute makes a church a partner, agent, instrumentality or "engine"—as James Madison would have put it—of civil policy. Even if this court should wish to be as generous as it was in *Allen*, it cannot fail to distinguish the degree of church-state involvement in the two situations. Here the pleadings show that the government finances buildings for church schools. This is not controverted. Even if one accepts the proposition that the underlying purpose of the legislation is to help institutions of learning to teach secular subjects only, to raise the educational standards only

for secular subjects, to benefit students without helping church schools in their basic responsibility of teaching and practicing religion, nevertheless, the United States may not use a church to do this, since available secular means will suffice.

Mr. Justice Brennan concurring in *Schempp*, supra, stated the general rule:

> "Equally the Constitution enjoins those involvements of religions with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends where secular means would suffice.*" (p. 231) (emphasis supplied)

Mr. Justice Frankfurter in his concurring opinion in *McCollum v. Board of Education*, 333 U.S. 203 (1948) repeated the principle: "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." (p. 227). Similarly, in *Schempp*, the Supreme Court held:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." (p. 222)

Now it is clear that the State may perform services for the church - just as for any other nonprofit organization within its jurisdiction, provided the services are governmental in nature and are not intended to aid the church in its religious functions. But in determining what services the state can supply a church, we must find out whether in the process the church becomes an agent of the Government,

a conduit, a "civil engine," or is merely the recipient of a service enjoyed by all institutions regardless of being a church, such as fire and police protection. The state may put out a fire, inspect a faulty roof, apprehend a vandal in a church, but it may not use a church or pay church employees to perform these services. Such services churches are entitled to receive, in effect, as citizens. But here the design is either to use the church to carry on a secular educational program of the government or more fundamentally to aid churches in their own educational responsibilities, which as Chief Justice Burger noted in *Walz*, assures future adherence to some particular faith. These powers, as was shown in *Everson* and criticized in Madison's *Remonstrance* the state does not have. However the state is not without other constitutional means to carry out these laudable public purposes, it can finance public, and independent private colleges, as was judicially approved in *Clayton* and *Mann* (below), an otherwise thoroughly practicable constitutionally permissible alternative.

Of course it is difficult in some cases to determine just which institution is a church-related one. However in *Horace Mann League of* the *United States v. Board of Public Works*, 242 Md. 645, 220 A2d. 51 (Ct. App. 1966), cert. denied and appeal dismissed, 385 U.S. 97, (1966) a test was laid down to guide in determining whether a particular college is, in fact, so religiously oriented as to require or merit separate treatment under the religious clauses of the First Amendment:

> "The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian); (3) the college's re-

> lationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curriculum programs; (5) the result or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community."

Such a test is not needed in this case for all the defendant colleges are admitted to be church-related.

Even where there is no question as to the nature of the institution receiving the aid, nor as to the purpose and primary effect of the statute involved, there is still a question as to the degree of state involvement with religious affairs created by a particular piece of legislation. None but the extremist can fail to see that in a 'pluralist society' with separation of powers and the separation of church and state built into the basic constitution, still all activities fade into each other to make up a composite whole. The principle may be clear, but the day to day application requires judgment.

In *Clayton v. Kervick*, decided July 20, 1970, in the Supreme Court of New Jersey, the New Jersey Educational Facilities Authority Law, N.J.S.A. 18 A:72 A-1, was upheld as constitutional. Like the Higher Education Facilities Act of 1963, the purpose of that legislation was to

assist colleges, including church colleges to finance construction of needed buildings. Chief Justice Weintraub pointed out in *Clayton:*

> "The statute is designed to provide funds to finance the construction of dormitories and educational facilities for public and private institutions of higher education. To that end, the statute created the New Jersey Educational Facilities Authority (herein Authority), 'a public body corporate and politic." N.J.S.A. 18A:72A-4(a). It should be stressed at once that *the statute does not provide for a gift or grant of State moneys to any institution.* Rather the plan calls for the Authority to operate on a self-sustaining basis. The Authority sells its bonds to private sources and pays the principal and interest out of revenues gained by the use of the moneys so obtained. *Secs.* 11, 30, and 31. As to private educational institutions, the Authority may lend the moneys to the institution, or the Authority may erect a facility on lands conveyed to it by the educational institution, return the improved property to the institution by a lease, and reconvey title upon full performance of the lease. Either way, the charge the Authority makes must cover the principal of and interest on the bonds the Authority issues for the moneys employed in the transaction. *Thus there is no gift or grant of moneys. And the bonds are the obligations of the Authority alone. They are not debts of the State, and the State's credit is not pledged. Secs.* 10 and 37. The bonds and property of the Authority are exempt from State and local taxation, *sec.* 18, and this, together with the exemption of the bonds from federal taxation, reduces the cost of money to the Authority and makes the plan feasible. (Slip opinion pp. 2,3) (emphasis supplied).

This is a recent example, post-*Walz*, of an 'Act' which, although it may indirectly aid religion as does the First Amendment itself, does not involve the State with the church to any appreciable degree. The New Jersey Su-

preme Court correctly distinguished their Act from the one before this court. ". . . the statute before us is more distant from the constitutional barrier than the Higher Educational Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964) which provides for outright grants . . ." (*Clayton*, slip opinion p.9).

A similar Act was upheld in *Vermont Educational Buildings Financing Agency v. Mann*, 127 Vt. 262, 247 A.2d 68 (Sup. Ct. 1968), juris. postponed, 394 U.S. 957, appeal dismissed under R.60, 396 U.S. 801 (1969). In connection with the Vermont plan of nonstate assistance to church colleges and in answer to a letter, the Secretary-Treasurer of the Vermont Educational Buildings Financing Agency, Mr. Robert Tracy, could properly reply:

> "While the Agency was established by the Legislature, the enabling act makes no provision for a State guarantee nor did it provide a nickel of operating funds for the Agency. For some three years, we have been operating without expense to the State. The extent of the subsidy, if any, is a willingness of the Federal government to permit bonds issued by the Agency to be tax exempt."

Amicus can find no violation of sound church-state relations in either the *Clayton* or *Mann* situations, particularly in view of the finding in *Walz* that tax exemption is not sufficient an aid or involvement to come within the strictures of the First Amendment.

Both *Clayton* and *Mann* also fall neatly into place in the line of opinions which hold that the State may not use religious institutions to accomplish even secular ends provided there are secular means available. In both *Clayton* and *Mann* the secular means were demonstrated. Congress, if it wishes to indirectly aid church colleges in their secular activities, may handle the problem as was done in *Clayton* and *Mann*—create some sort of nonstate public agency to help finance construction at any college regardless of the religious or nonreligious nature of the college. The funds,

responsibility and supervision must be nonstate though the agency may be authorized by the state. No church-state problem will then be involved. Amicus found no church-state problems in either *Clayton* or *Mann*.

The relationship between church and state in the "modern welfare state" is a most delicate one. The federal constitution has been construed to provide for such a State. Any judgment as to whether or not a particular program of public welfare actually promotes the general welfare is left to the Congress, with one or more important exceptions. The exception here pertinent is that the "establishment clause" forbids a merger of church and state to accomplish a welfare function. Financing college buildings is a public purpose and a welfare function. The "establishment clause" also guarantees that a church may not be used as "an engine of civil policy" no matter how much welfare may be enhanced. Who is to say that complete support by the Government of the church as the representative of God on earth would not be the highest form of welfare, the greatest possible child benefit? If the teachings of some of the major religions are true, it is inescapable not to conclude that taxpayer support of one particular church—the one which has the correct path—is the finest type of "welfare" and child benefit too. But, which one? However, the founding fathers, led by Jefferson and Madison, conceived of a "limitarian State"—one where the powers to undertake certain activities—for the general welfare, if you will—is prohibited to that State. The opposite form of State is "totalitarian." The establishment clause of the First Amendment accomplished just this limitation. Welfare, yes—but not when achieved by tax support for religious institutions directly or indirectly, for good or bad. Both the church and the state may most properly pursue the general welfare but not as instrumentalities of one another.

Unfortunately, the court below, applying the "purpose and primary effect" test associated with both *Everson* and *Abington School District v. Schempp*, 374 U.S. 203, 222

(1963) came up with a new reading of the religious clauses of the First Amendment: "The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." (slip opinion at 13). Thus the court below would permit the government, state or federal, to assist church schools and to use church schools to carry out the educational responsibilities of the State, provided only that the particular courses taught are secular and not religiously oriented. Referring to the Higher Education Facilities Act of 1963, which grants federal funds to church-related colleges for construction of academic facilities, the Court below stated: "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions." (slip opinion, page 15)

It does not take any great cerebration to realize that a pandora's box of religious strife will be opened if this new erosion of the principle of separation of church and state is permitted to undermine the religious clauses of the First Amendment. Any conceivable secular activity or function of a present-day church could be subsidized at taxpayer expense if it is the nature of the function rather than the nature of the institution which is the test for avoidance of the principle of separation of church and state. Gaston D. Cogdell, in his recent book, *Parochiaid,* points out the intercreedal rivalries which this new gap in the wall of separation will generate:

> "And as social services, do they not deserve tax support? They deserve it as much as do parochial schools—and more so. What is there about a church building that is sectarian or even religious, except perhaps the crosses or crucifixes in it, and occasionally the stained glass windows? If tax money is to be used for 'nonsectarian' church activities, let not all of it be given to the Roman Catholic Church, with a tiny little bit going to a few others.

> Let's divide the public bounty fairly and equally between all the 258 different religious denominations in the country for their 'nonsectarian' buildings, activities and programs. Every one of the 258 different denominations must get its 'fair share' of the tax money now going almost wholly to the Roman Catholic Church for the nonsectarian functions which they perform for society, if there is to be any justice, fairness, equity, or honesty in the state's largesse to the institution and activities of the various religious sects and their clergy." (p. 75)

If the practice of subsidizing church groups were once to be permitted by this court, many more churches will undoubtedly organize their own private schools and colleges. If tax funds were available to build them, these churches would vie with one another for their share of the melon. This is the very kind of strife which, as Lord Bryce wrote, had been averted in the United States by its arrangement of church-state separation. He pointed out in his *American Commonwealth:*

> "Half the wars of Europe, half the internal troubles that have vexed the European states . . . have arisen from theological differences or from the rival claims of church and state. This whole vast chapter of debate and strife has remained virtually unopened in the United States."

Many have been distressed in recent months to read and hear of a "black education" under "black auspices" handled by "black instructors." If one group or one church can segregate its constituents from the community for indoctrination purposes, and receive public subsidy for its buildings for so doing, why cannot others do the same? Is not this exactly what we invite when we provide for public subsidy for sectarian groups to build their own college buildings in their own segregated private colleges? What happens, then, to national unity and to our sense of common purpose? How much wiser the arrangement envisaged created by the constitution which limits public tax-

payer support to the common school open to all persons without discrimination or creedal distinction, where there is no indoctrination program but where the rights and values of all faiths are respected. How much wiser to have the church and state pursue common goals, not harnessed to one another. Thus the church and the state can pull together. There will be no need to pull apart—for they are not shackled one to the other. Each is free to pursue its peculiar goals in its own way under its own power.

This clamor for taxpayer support of private church colleges further offends the Fifth Amendment of the Constitution by involving the government in private discrimination. That the United States may not use public funds to support or subsidize private discriminations by building facilities for church schools is clear from such decisions of this court as *Reitman v. Mulkey*, 387 U.S. 369, (1967). Private schools are an island of religion in a sea of secularism. This is their private privilege, but not one that the state can subsidize, condone, or even encourage or discourage. As was recently pointed out in *Coffey v. State Education Finance Commission*, 37 L.W. 2451, (1969):

> "There is no claim in this case that the constitution requires all children to attend public schools, or that a private citizen may not select a private segregated school for his child because of the desire to keep the child from being educated with children of a different race. What is involved here are legislative enactments which 'will significantly encourage and involve the State in private discriminations'." *Reitman v. Mulkey*, 387 U.S. 369

It is also clear that religious preference is a form of "private discrimination." Let us keep it thus, personal and private.

The language in the separate opinions in *McCollum v. Board of Education*, 333 U.S. 203 (1948), is not only helpful as to the law of this case but interesting and informative. We shall sum up the principles which govern this litigation in the words of Mr. Justice Frankfurter who stated:

> "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation' –Elihu Root's phrase bears repetition–is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity."

This court may also care to keep in mind the prediction of Professor Paul A. Freund of Harvard in *"Public Aid to Parochial Schools"* (74 Case and Comment 4, (1969) where he writes: "Arguing that the aid in the New York case [Allen] was sustained because it was available neutrally to pupils in all accredited schools, the proponents are likely to insist that such aid is not merely permissible, but is mandatory, since the First Amendment enforces just this standard of neutrality among religions and between a religious and a secular promotion of a common public purpose." (p.4) There are cases pending in Missouri and California which seek to require State support of church schools similar and equal to the support given to the public school system! Soon we may hear that construction financing, now available to the public school system and to state and independent colleges, will be demanded as a matter of right for church colleges and private parochial schools. The grant of these demands will signal the end of religious freedom as we have known it under the Establishment Clause of the First Amendment.

CONCLUSION

For the reasons above stated, the judgment of the District Court panel of three judges of the District of Connecticut dismissing the appellants' Complaint should be reversed and remanded for a hearing on the merits, with an opinion on the principles of constitutional law involved.

Respectfully submitted,

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE.

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